Supreme Court of the United States

OCTOBER TERM, 1955

No. 343

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1113,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REHEARING

The petitioner, United Electrical, Radio and Machine Workers of America, Local 1113, prays for a rehearing and reversal of the order of this Court entered on March 5, 1956, denying its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Intervening Circumstances

1. Subsequent to the Court's order of March 5, 1956, the Court has granted the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Lion Oil Co.* (Petition for Certiorari No. 241, October Term 1955). The instant case involves the same basic issues of the limitations imposed by Section 8(d) of the Act upon the right to strike as does the *Lion Oil* case. Petitioner should not be finally foreclosed by this Court until the *Lion Oil* case be decided.

In the *Lion Oil* case the union there involved sought modification of the contract and struck during the term of the contract, and at the time when the contract itself provided for submission of proposed amendments to the contract. The Court of Appeals for the Eighth Circuit (reaffirming its interpretation of Section 8(d) in *Local No. 3, United Packinghouse Workers of America, CIO* v. *N. L. R. B.*, 210 F. 2d 325) held that the provisions of Section 8(d) forbade any strike during a contract term until the terminal date of the contract, and that the striking employees were not entitled to reinstatement. Likewise, in the instant case, the Union and the Employer had entered into bargaining on modification of the contract during the contract term. The Court below here, held likewise, that the strike was prohibited by Section 8(d), and that the strikers were not entitled to an employee status under the Act.[1] Both this case and *Lion Oil,* therefore, present the same basic issue of how, if at all, the provisions of Section 8(d) limit the right of employees to seek modification of their contract and to strike during its term.

2. Prior interpretations of Section 8(d) by the Board and lower courts have taken at least four positions on the question of when in a contract relationship the restrictions of Section 8(d) apply. Only two of these interpretations will be presented to the Court by the parties in *N. L. R. B.* v. *Lion Oil Co.* The Court will thus not have available to it full exposition of all facets of the argument unless certiorari be granted here and this case joined with *Lion Oil* for argument.

In the Board's first interpretation of the Section 8(d) proviso, three members of the Board held that Section 8(d) did not restrict the right to strike during the contract term provided the notices required by that Section were given.

[1] The interpretation of Section 8(d) in this case had even more far-reaching implications than in *Lion Oil,* since the court below held that the Union violation released the Employer from its own obligations under Section 8(d) of the Act.

United Packinghouse Workers of America, 89 N. L. R. B. 310. (This position was followed by Board Member Peterson in *Lion Oil Co.,* 109 N. L. R. B. 680.) The two remaining Board members (Chairman Herzog and Member Murdock) interpreted Section 8(d) as only restricting the right to strike at the end of the contract term and having no application to strikes during the contract. (This position was adhered to by Board Member Murdock in the *Lion Oil* case). In *Lion Oil Co.,* however, a majority composed of new members of the Board reversed the Board's previous position and held that the limitations of the 8(d) proviso prevented any strike except when the contract itself envisaged contract modification or termination. The Court of Appeals for the Eighth Circuit (both in *Lion Oil* v. *N. L. R. B.* (C. A. 8, 1955), 221 F. 2d 331 and previously in *United Packinghouse Workers of America, Local 3* v. *N. L. R. B.* (C. A. 8, 1954), 210 F. 2d 325), has held that Section 8(d) forbids all strikes until the termination date of the contract, regardless of previous collective bargaining negotiations. There, thus exist four relevant interpretations of the limitations which Section 8(d) places upon the right to strike.

1) The Section forbids all strikes until the end of the contract term.[2]

2) The Section forbids all strikes except at the end of the contract or at a time when the contract itself envisages modifications.[3]

3) The Section does not restrict strikes at any time during a contract term, provided only that a proper notice be given.[4]

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[2] *United Packinghouse Workers of America, Local 3* v. *N. L. R. B.* (C. A. 8, 1954), 210 F. 2d 325; *Lion Oil Co.* v. *N. L. R. B.* (C. A. 8, 1955), 221 F. 2d 331.

[3] *Lion Oil Co.,* 109 N. L. R. B. 680.

[4] *United Packinghouse Workers of America,* 89 N. L. R. B. 310.

4) The Section forbids strikes only in the sixty days immediately prior to the terminal date of the contract.[5]

The present alignment of parties before this Court in *Lion Oil* is such as to insure adequate presentation to this Court only of the arguments supporting the majority opinion of the present Board and of the Court of Appeals for the Eighth Circuit. Should the Oil Worker's International Union intervene in that case, it might be speculated that they would present the argument for the position of the Board majority in *United Packinghouse Workers of America.* No party, however, has adopted as its own the interpretation given the Section by Chairman Herzog and Board Member Murdock. Of the parties presently raising the question before the Court only the Petitioner here is committed to their interpretation of Section 8(d) by the facts of its case and obligated by the pressures of litigation to present it fully and completely to this Court.

It cannot be maintained that this interpretation of the Act is not entitled to consideration. The opinion of Chairman Herzog and Member Murdock show that it is amply grounded in the history and purpose of the Act. Chairman Herzog was Chairman of the Board while the 1947 Amendments were under consideration and enacted. Board Member Murdock brought to the Board his previous experience as a Senator in 1940-1946, a period when Congress had under consideration a number of proposals which were later incorporated in or influenced the 1947 Amendments. The logic of their position was adopted by Judge Swan in *N.L.R.B.* v. *Mastro Plastics Corp.,* 214 F. 2d 462.[6] It is deserving of presentation to this Court.

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[5] Chairman Herzog and Member Murdock in *United Packinghouse Workers of America,* 89 N. L. R. B. 310.

[6] This Court's subsequent reversal of that case (*Mastro Plastics* v. *N. L. R. B.,* No. 241, October Term 1955) did not deal with the question of when Section 8(d) might apply temporally.

Other Substantial Grounds for Writ of Certiorari

3. The opinion below raises an important question under the National Labor Relations Act as to the relationship which the Act creates between unions and the workers whom they represent under the Act. The Court below adopted the Board finding as urged before it that the discharged non-participating employees ratified the walkout by failing to repudiate the action of their statutory collective bargaining agent (J. A. 193-194, Petition, App. B, p. 43). The decision below thus departs from the common law rules of agency which require that a purported agency relationship exist before ratification by silence of an agent's misconduct be inferred [7] and creates a unique statutory agency under the National Labor Relations Act between the statutory collective bargaining representative under Section 9(a) of the Act and the employees whom it represents.[8]

The decision below thus raises the following question for determination by this Court:

> "Does Section 9(a) of the National Labor Relations Act create a relationship between employees and their collective bargaining representative whereby the employee is presumptively responsible for misconduct of that representative in dealing with the employer?"

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[7] Mechem, Outlines of the Law of Agency, p. 75 (3d Ed. 1923); Restatement, Agency Section 85(1).

[8] The union membership of the non-participants does not permit of the conclusion that the Court below might merely have misapplied common law rules of agency. The union membership here was compelled by contract under the provisions of Section 8(a)(3) of the Act. Union membership in such circumstances is merely an extension of the statutory collective bargaining relationship established by Section 9(a) of the Act. By the terms of Section 8(a)(3), a union shop is permitted only to the collective bargaining representative under Section 9(a) of the Act and the obligations of union membership are confined to the payment of dues.

This Court has in the past ruled on questions dealing with the authority of the statutory collective bargaining representative to bind the employees contractually. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Aeronautical Industrial District Lodge* v. *Campbell*, 337 U. S. 521. The question here presents an equally important facet of this problem which vitally affects the millions of American workers subject to the jurisdiction of the Act and which has not been, but should be, settled by this Court. For, if employees are to be made liable for all acts of their collective bargaining representative, vis-a-vis their employer, then willy-nilly their right to refrain from concerted action guaranteed them by Section 7 of the Act becomes meaningless.

The Act itself indicates a Congressional purpose not to impose corporate personal responsibility upon the members of the bargaining unit for all the acts of their bargaining agent. Section 2(13) of the Act incorporates the common law doctrines of agency into the Act.[9] And, in any suit under Sections 301(a) or 303 of the Act, recovery may only be had from the union treasury and a judgment "is not enforceable against any individual member or his assets." Section 301(b). If Congress did not intend to extend the responsibility of individual members for union acts beyond common law limits, then, a fortiori, it did not intend to extend the previous limits of vicarious responsibility to include responsibility of all employees in the bargaining unit for the acts of their collective bargaining representative.

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[9] "[B]oth employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency * * *" H. Conf. Rep. No. 510, 80th Cong. 1st Session, 36 in 1 Legislative History of the Labor Management Relations Act, 540.

CONCLUSION

The Petition for rehearing should be granted, the Court's order of March 5, 1956 vacated, and a writ of certiorari issued to the United States Court of Appeals for the District of Columbia Circuit.

In the alternative this Court should stay the determination of this Petition pending the decision in *National Labor Relations Board* v. *Lion Oil Co.*

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

DAVID SCRIBNER.